

CCASE:  
MSHA V. S & H MINING  
DDATE:  
19920108  
TTEXT:

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 91-18  
Petitioner : A. C. No. 40-03011-03509  
: :  
v. : S & H Mine #7  
: :  
S & H MINING, INCORPORATED, :  
Respondent :

DECISION

Appearances: Mary Sue Taylor, Esq., Nashville, TN,  
for Petitioner;  
Mr. Paul G. Smith, Lake City, TN,  
for Respondent.

Before: Judge Fauver

The Secretary seeks a civil penalty for an alleged violation of an electrical safety standard, under 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and further findings in the Discussion below:

FINDINGS OF FACT

1. S&H Mining, Inc., owns and operates S&H Mine No. 7, an underground coal mine, in Campbell County, Tennessee. The mine was opened in April, 1989. Paul Smith and Bob Swisher are owners of the operation. The mine produces coal for use in or substantially affecting interstate commerce.

2. MSHA Inspector Don McDaniel, who specializes in electrical inspections, issued 107(a) Order No. 3381336 on May 18, 1990, to Tommy McCool, Mine Superintendent of No. 7 Mine, alleging the following condition as an imminent danger:

[T]he high-voltage power line, 12,470 volts,  
that supplies power to the mine was installed

from 8'6" to 15' off the ground from the first set of disconnection devices to the highwall which is a distance of approximately 300 feet.

3. Citation No. 3381337 was issued by Inspector McDaniel for a violation of 30 C.F.R. 77.807 based on this condition. Section 77.807-1 requires that:

High-voltage powerlines located above driveways, haulageways, and railroad tracks shall be installed to provide the minimum vertical clearance specified in National Electrical Safety Code: Provided, however, that in no event shall any high-voltage powerline be installed less than 15 feet above ground.

4. Inspector McDaniel began his electrical inspection of the mine one to two weeks before issuing the 107(a) order and 104(a) citation. When he began the inspection, he told McCoo that he wanted to know the height of high-voltage lines installed on a slope going down to the high wall. The high-voltage lines have four wires: three phase wires and a neutral ground wire. Each phase wire carries 7,200 volts, and the entire system has 12,470 volts. There is no protective insulation jacket on the high-voltage lines, which are bare wires when hung. The magnetic field around each phase wire is about two feet. Both MSHA standards and the National Electrical Code require that high-voltage wires be hung at least 15 feet above the ground in areas where people may travel to avoid any likelihood of contact with the wires.

5. Normally, the three phase wires are hung about two to three feet above the neutral (ground) wire in a high-voltage system. Phase and ground wires are purposefully hung with a natural sag to allow some give.

6. The high-voltage wires at Mine No. 7 were strung on three poles. Two poles belonged to S&H Mining and a third pole belonged to Clinton Power Utility. The wires went from the Clinton Power Utility pole at the top of a hill through the two company poles and then over the highwall and down to a substation. The phase wires were loose with a lot of sag in them, and there was a possibility that the wind would blow them together.

7. The powerline was installed by a contractor who had been recommended to S&H Mining and had done other work for the company. The line was inspected by Clinton Power and by a state electrical inspector before it was energized.

8. The road leading to Mine No. 7 is a public access road to within 1/4 mile of the mine site. Graveyards are at the top of the hill. The road forks before reaching the mine site. Persons have

~108

access to the area above the mine by this road, and the area is traveled by the public including children, hunters and four-wheel drive vehicles. In addition, goats roam the area above the highwall, adding to the attraction of visitors to the area. There are no barriers to this area.

9. A road leads from the mine site up the hill above the highwall, where the terrain is rough to steep.

10. Under the Act and regulations, the company is required to check the electrical system once every 30 days as part of their electrical exam. The examiner must check the high-voltage lines to see whether insulators or the neutral wire is broken and to check the height of the high-voltage lines. The area where Inspector McDaniel measured the wires is within the scope of these required exams. It is also subject to travel by the public, since there are no barriers preventing public access.

11. Inspector McDaniel arrived at the mine on Friday, May 18, 1990, and contacted McCool. The two proceeded to the top of the hill above the highwall where the company poles were located. McDaniel took measurements of the ground wire and the phase wires. McCool was the only company official present when these measurements were made. McDaniel began making measurements at the metering base at the top of the hill and measured again about 300 feet past the two company poles toward the highwall edge. He wore high-voltage gloves and used a measuring stick. McDaniel's notes show that the distances from the earth to the wires were: ground neutral line measurements 14'6", 12', 10'8", and phase lines 11'6" to 9'6". He stopped measuring about 20 feet from the high wall because he felt that he was putting himself in danger to go any farther.

12. The terrain in the area past the last company pole is very steep. Because of his fear of heights, McCool did not accompany the inspector all the way down the hill. He could see McDaniel at all times, but he could not always see the measurements being taken or the wire that was being measured.

13. Upon finding the above measurements, McDaniel told McCool that he was issuing an order based on the low heights of the high-voltage lines. McCool and McDaniel then walked back down the hill to the bottom of the highwall.

14. McDaniel's practice as an electrical inspector was that, when he found high-voltage lines as low as Respondent's he took them out of service immediately because of the danger of electrocution. He has issued imminent danger orders in the past for phase wires being less than 15 feet from the ground. McDaniel told McCool that he would have to remove power from the line.

15. Company officials were disturbed by the imminent danger

order and asked McDaniel to point out the conditions to them. McDaniel went back up the hill with them and took a second set of measurements. He was accompanied by White, McCool, and Smith. White went to within 50 feet of the location where McDaniel took the second set of measurements. Smith was about 300 feet from McDaniel when he took the second set of wire measurements.

16. White testified that, based on what he saw, he did not doubt that the phase wires were less than 15 feet of the ground, but that he did not personally witness McDaniel measure a phase wire. Smith stated that McDaniel did not in fact measure a phase wire, and that the order was based on the ground wire measurements alone. However, Smith could not see which wires were actually measured by McDaniel.

#### DISCUSSION WITH FURTHER FINDINGS

The parties are in sharp dispute whether Inspector McDaniel measured phase wires and the ground wire or measured only the ground wire.

Paul Smith, co-owner of S&H Mining and an active supervisor at No. 7 Mine, testified that, in the second measurements, Inspector McDaniel did not measure the phase wires and all indications to Smith were that McDaniel did not measure the phase wires in his first measurements. Although Smith was not present when McDaniel made his first measurements, Smith testified that when McDaniel discussed the order and citation with him, the ground wire was the only wire discussed. He stated that the first time that McDaniel stated that a phase wire was found to be under 15 feet was at the hearing of this case.

McDaniel testified that he used the term "high-voltage power line" to include the four wires, and did not base the order and citation on a finding that the ground wire was the only wire that was under 15 feet.

The evidence shows a misunderstanding between the inspector and mine management as to the basis for the order and citation. The inspector made the measurements shown by his notes, and found a phase wire below 15 feet from the earth. However, his order stated that the high-voltage line was from "8'6" to 15' off the ground." To him, the high-voltage line included all four wires, and he meant both the phase wires and the neutral wire in his order and citation.

I find that the order and citation reasonably specify the condition found by the inspector. However, the order and citation would have been clearer had the inspector stated his measurements of the phase wires.

Respondent contends that the facts in any event do not warrant

an imminent danger order and that the citation should be reduced to an allegation of a non-significant and substantial violation.

The Commission has held that a violation is "significant and substantial" if there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." U.S. Steel Mining Co., Inc., 7 FMSHRC 327, 328 (1985); Cement Division, National Gypsum Co., 3 FMSHRC 822,825 (1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984). This evaluation is made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498 (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (1987).

Analysis of the statutory language and the Commission's decisions indicates that the test of an S&S violation is a practical and realistic question whether, assuming continued mining operations, the violation presents a substantial possibility of resulting in injury or disease, not a requirement that the Secretary of Labor prove that it is more probable than not that injury or disease will result. An illustration of this point is U.S. Steel Mining Co., Inc., supra, in which the Commission affirmed an S&S finding by a Commission judge. The judge found that:

\* \* \* [A]n insulated bushing was not provided where the insulated wires entered the control box for a water pump. The insulation on the wires was not broken or damaged. The water pump's electrical system was protected by two fuses - one a 30 amp fuse on the cable, and one a 10-30 amp control fuse inside the box. When it is operating, the pump vibrates, and the vibration could cause a cut in the insulation of the wire in the absence of a bushing. This could result in the pump to become the ground and, if the circuit protection failed, anyone touching the pump could be shocked or electrocuted. \* \* \* [5 FMSHRC at 1791 (1983); emphasis added.]

As found by the judge, injury from the missing-bushing violation could result if the insulation wore through to metal and the circuit protection system failed to operate. However, one may observe that circuit protection devices are not presumed to be "reasonably likely" to fail unless they are found to be defective. There was no finding of defective fuses in the U.S. Steel case. The violation presented a substantial possibility of injury, not proof that injury was more probable than not. The effective meaning of the Commission's term "reasonably likely to occur" as applied in cases such as U.S. Steel is to find an S&S violation if the violation presents a substantial and significant possibility of injury or disease, not a requirement that injury or disease is more

probable than not. This meaning harmonizes with the statute, which does not use the phrase "reasonably likely to occur" or "reasonable likelihood" in defining an S&S violation, but states that an S&S violation exists if the "violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" ( 104(d)(1) of the Act; emphasis added). In contrast, the statute defines an "imminent danger" as "any condition or practice . . . which could reasonably be expected to cause death or serious physical harm before [it] can be abated" (Footnote 1) and expressly classifies S&S violations as less than imminent dangers. (Footnote 2)

Thus, an "imminent danger" is a graver safety hazard than an S&S violation. I find that the height and location of the wires found by the inspector presented a substantial possibility of resulting in serious injury, but did not show an "imminent danger." The area was accessible to the public, and to the company's electrical examiners, but considering the lowest height of the phase wires at 9'6", and the relative infrequency of persons being in the area, I find that the Secretary did not prove that it "could be reasonably expected" that the condition would "cause death or serious physical harm before [it could] be abated."

Accordingly, the imminent danger order will be vacated, and the 104(a) citation will be affirmed.

Considering all the criteria for a civil penalty in 110(i) of the Act, I find that a civil penalty of \$300 is appropriate for the violation.

#### CONCLUSIONS OF LAW

1. The judge has jurisdiction in this proceeding.
2. The Secretary did not prove that an imminent danger existed as alleged in Order No. 3381336.
3. Respondent violated 30 C.F.R. 77.807 as alleged in Citation No. 3381337.

#### ORDER

1. Order No. 3381336 is VACATED.
2. Citation No. 3381337 is AFFIRMED.

---

1 Section 3(j) of the 1969 Mine Act, unchanged by the Federal Mine Safety and Health Act of 1977.

---

2 Section 104(d)(1) limits S&S violations to conditions that "do not cause imminent danger. . . ."

~112

3. Respondent shall pay a civil penalty of \$300 within 30 days of the date of this decision.

William Fauver  
Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Mr. Paul G. Smith, S&H Mining, Inc., P. O. Box 480, Lake City, TN 37769 (Certified Mail)

/fas